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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PARAGOULD CABLEVISION, INC.,
Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF WARNER CABLE COMMUNICATIONS INC. IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-4659

PARAGOULD CABLEVSION, INC.,

Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION OF WARNER CABLE COMMUNICATIONS INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Supreme Court Rules, *Amicus Curiae* Warner Cable Communications Inc. ("Warner Cable") hereby moves this Court for leave to file the attached Brief *Amicus Curiae* in support of Petitioner Paragould Cablevision, Inc. ("Cablevision"). This motion is necessary because one of the parties, City of Paragould, has refused to provide this *amicus* with written consent to file a Brief *Amicus Curiae*, and because of certain time constraints counsel for another party, The Paragould Light and Water Commission, was unable to affirmatively grant or deny its consent prior to the filing deadline.

Warner Cable is wholly owned by Warner Communications Inc., a wholly-owned subsidiary of Time Warner Inc. Warner Cable owns and operates over 122 cable television systems throughout the United States, which combined serve approximately 1.6 million subscribers.

The issues raised by Paragould's petition are of great concern to Warner Cable and this *amicus* supports Paragould's petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Despite a formal request by counsel for this *amicus* to obtain written consent from Cablevision, City of Paragould, and The Paragould Light and Water Commission, and despite Cablevision having given its written consent, which is being filed with the Clerk, City of Paragould has formally refused to give written consent to this *amicus* to file a Brief *Amicus Curiae*. Counsel for The Paragould Light and Water Commission was unable to affirmatively grant or deny its consent.

WHEREFORE, Warner Cable respectfully requests that this Court allow it to file a Brief *Amicus Curiae* in support of Paragould's petition.

Respectfully submitted,

/s/ R. Bruce Beckner
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BRIEF *AMICUS CURIAE* OF WARNER CABLE COMMUNICATIONS INC. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Warner Cable Communications Inc. ("Warner Cable") submits this Brief *Amicus Curiae* in support of Paragould Cablevision, Inc. ("Cablevision"), petitioner for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Warner Cable is wholly owned by Warner Communications Inc., a wholly-owned subsidiary of Time Warner Inc. Warner Cable owns and operates cable television systems in 22 states, providing cable television ser-

vice to approximately 1.6 million subscribers. Warner Cable operates systems in large metropolitan areas as well as in small cities and towns. Presently, Warner Cable has four cable television systems threatened with pending municipal overbuild activity, and it has previously litigated related issues in a municipal overbuild case, which ultimately resulted in this Court denying Warner Cable's petition for certiorari. *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, ___U.S. ___. 111 S.Ct. 2839 (1991).

The Petition of Cablevision asks this Court to set the boundaries of municipal immunity (under *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny) from the antitrust laws at a point where such laws may be invoked to prevent a municipality, acting as a market participant, from engaging with impunity in whatever anticompetitive, predatory, and coercive activities it desires until it has succeeded in running its competitor out of business. The Petition also asks this Court to determine whether, and under what circumstances, a cable company's acceptance of a franchise from a local government can operate as an explicit or implicit waiver of fundamental Constitutional rights. In *City of Niceville*, the Eleventh Circuit held that the First Amendment afforded Warner Cable no protection against the kinds of conduct by a city-owned cable competitor that are alleged here, even when that conduct threatened to silence the only local mass media First Amendment speaker. In the decision for which the Writ is sought here, the Eighth Circuit held that the federal antitrust laws offered no protection to a cable operator threatened with the same kind of conduct from a municipally-owned competitor. Given that the antitrust laws and the First Amendment are the only possible sources of protection from this kind of conduct, the fundamental question raised by the Petition is whether cable operators have any legal protection from abusive marketplace conduct by a government-owned competitor. Warner Cable believes that,

as a matter of law, there is such protection; and that, as a matter of policy, there should be such protection. Therefore, Warner Cable supports Cablevision's petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

STATEMENT

This case comes to this Court after the Court of Appeals affirmed a dismissal under Rule 12 (b)(6) Fed. R. Civ. P. by the U.S. District Court for the District of Arkansas.[1] The allegations of Cablevision's complaint, which are set forth in considerable detail in Cablevision's Petition to this Court,[2] tell a story of a competitor exploiting its unique advantages as a governmental agency to the fullest—with predictable results.[3] *See, e.g.*, Petition at pp. 4 - 5 and at p. 18, n. 9. With an existing public utility operation already in place and a direct pipeline to the public fisc, the City of Paragould and its Light and Water Commission (hereinafter referred to collectively as the "City") have both the incentive and the ability to ensure that the City-owned cable television system triumphs in the competitive struggle with Cablevision.

Cablevision's predicament in Paragould is quite similar to Warner Cable's predicament in Niceville, Florida, where it is facing competition from a municipally-owned competitor. *See generally, Warner Cable Communications Inc. v.*

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[1] The District Court opinion is reported at 739 F. Supp. 1314 (E.D. Ark. 1990). The Court of Appeals opinion is reported at 930 F.2d 1310 (8th Cir. 1991).

[2] *Paragould Cablevision, Inc. v. City of Paragould & the Paragould Light and Water Comm'n, et al.*, Petition for Certiorari in Docket No. 91-465 (filed September 16, 1991)[hereinafter referred to as "Petition"].

[3] Of course, it is well-settled that the allegations of Cablevision's complaint must be taken as true, given the procedural posture of this case. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) and *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

City of Niceville, Petition for Certiorari in Docket No. 90-1463 (filed March 15, 1991). The phenomenon of municipally-owned cable systems competing with privately-owned systems is not a rarity. Privately-owned cable operators in at least six communities now have a municipally-owned competitor, and such competition is imminent in 85 other communities in the United States. Paul Kagan Associates, *Cable TV Municipal Ownership*, March 8, 1991. The significance of this case goes far beyond the parties before this Court.

In affirming the district court's dismissal of Cablevision's complaint, the Eighth Circuit held that this Court's application of the *Parker* immunity doctrine in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), and the fact that the City's entry into the cable television business was authorized by the Arkansas legislature totally immunized the City from suit under the federal antitrust laws.[4] *Paragould Cablevision v. City of Paragould*, 930 F.2d 1310, 1313 (8th Cir. 1991). In effect, the Eighth Circuit held that the Arkansas legislature had given the City a license to trample on Cablevision's rights, unfettered by the rules of the marketplace established by federal antitrust jurisprudence: "Because of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies." *Paragould Cablevision*, 930 F.2d at 1314.

Cablevision also complained that a franchise provision that appears to require it to obtain the City's permission

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[4] Due to the federal statutory immunity from antitrust damage suits granted municipalities by the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, the only antitrust action available to Cablevision was an action for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. Thus, the question here is whether or not the City and its officials can be enjoined from anticompetitive conduct, not whether they can be forced to pay for its consequences.

to carry local advertising and to pay a tax on revenues from such advertising together with the fact that the City-owned cable system is permitted to carry such advertising without incurring such a tax is a violation of Cablevision's First Amendment rights under *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980) and under *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). *See Paragould Cablevision*, 930 F.2d at 1314, 1315. While conceding that Cablevision may have stated a valid claim with respect to both the prior restraint claim and the disparate treatment claim, the Eighth Circuit held that Cablevision had waived them all (including the disparate treatment claim, a matter clearly not addressed by the franchise provisions in question) by agreeing to the franchise: "By entering into the franchise agreement, however, Cablevision effectively bargained away some of its free speech rights." *Id.* at 1315.

This case presents two serious issues for this Court's consideration, both of which involve important statutory and Constitutional rights and both of which have not been consistently dealt with by the lower courts—the question of whether or not "state action" immunity under *Parker* extends to a state political subdivision's actions as a marketplace *competitor*[6] and the question of whether or not, under the circumstances relating to the formation of that "agreement," a cable television operator's franchise can

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[6] The term "marketplace participant," when applied to the City in this and similar situations carries with it the capacity for misperception. To the extent that any governmental unit, including a state or its political subdivision, is a buyer of goods and services, it is a "marketplace participant." Under those circumstances, the antitrust laws afford states and their subdivisions the same protection afforded any other consumer. *See, e.g., State of Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). Here, the City is not just a "marketplace participant," it is a marketplace *competitor*; and the question is whether or not its status as a government-owned competitor gives it special privileges.

be held to waive, explicitly or implicitly, fundamental Constitutional rights.

The first issue is the application of *Parker* immunity to cities acting, not as regulators, but as marketplace competitors. Although the *Parker* doctrine is based on the proposition that Congress, in enacting the antitrust laws, did not intend to preempt every state regulation that could be found to have an adverse effect on the competitive marketplace, that rationale does not apply to the situation where the state or its subdivision is acting as a marketplace competitor, rather than as a regulator. This Court appeared to recognize that distinction last term in *City of Columbia v. Omni Outdoor Advertising, Inc.*, ___U.S. ___, 111 S. Ct. 1344, 1351 (1991). The policy reasons that support immunizing the state or its subdivisions from antitrust liability when either acts as regulator or franchise-giver do not apply to a state governmental unit that is acting as a marketplace competitor. This is the appropriate case for this Court to make that distinction clear and to establish with certainty the principle that when a state or local governmental unit decides to act as a competitor in the marketplace it must abide by the same rules that govern its privately-owned competitors.

The second issue is whether a cable operator's conclusion of a franchise agreement with a city can be a waiver of important First Amendment rights. The cable television franchising process has all the characteristics of a contract of adhesion; the governmental unit has access to a facility indispensable for the cable operator's business. A cable television franchise, from the standpoint of the cable company is a "take-it-or-leave-it" proposition. In an number of different circumstances, cable operators have sought to challenge the effect of various franchise provisions under both the Constitution and the general federal statute regulating cable television, the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (hereinafter "Cable Act"). In every instance, the franchising authority has re-

sponded, in part, by claiming that the franchise agreement is a waiver of these Constitutional or statutory rights. Both the lower federal courts and state courts have responded differently, and inconsistently, to this waiver argument. For example, in *Nashoba Communications Ltd. Partnership No. 7 v. Nashoba Cable*, 893 F.2d 435 (1st Cir. 1990), the First Circuit held that a franchise provision containing a two-year rate freeze was a "contractual obligation" that precluded the cable company from bringing a federal court challenge to the freeze as a violation of the rate deregulation provisions of the Cable Act. By contrast, the Massachusetts Supreme Judicial Court, in *Town of Norwood v. Adams-Russell Co.*, 406 Mass. 604, 549 N.E.2d 1115 (Mass. 1990) on substantially similar facts held that a cable franchise rate freeze provision was preempted by the Cable Act and therefore unenforceable.

This case, because it involves the waiver of two First Amendment claims, one arguabiy encompassed by the language of the franchise and the other clearly not so encompassed, is an appropriate vehicle for this Court to address the status of cable television franchise provisions as waivers of federal Constitutional—and perhaps statutory—rights and to clear up the confusion among the decisions of lower federal and state courts.

REASONS FOR GRANTING THE PETITION

I. WHEN TOWNS AND CITIES ACT AS MARKETPLACE COMPETITORS, THEIR ACTS AND PRACTICES SHOULD NOT BE IMMUNE FROM SCRUTINY UNDER THE ANTITRUST LAWS.

The seminal decision establishing "state action" immunity, *Parker*, 317 U.S. 341, was a very narrow one, reached "in light of our national commitment to federalism." *Omni Outdoor Advertising*, 111 S. Ct. at 1351. *Parker* adjudicated various challenges to the State of California's "Agricultural Prorate Act," a statute that, among other things,

regulated the marketing of California raisins. It was alleged that the purpose and effect of this Act was to restrict competition among raisin growers and stabilize prices. *Parker*, 317 U.S. at 346. This Court noted that it assumed that the program would violate the Sherman Act (15 U.S.C. § 1 *et seq.*), "if it [had been] organized and made effective. . . by virtue of a contract, combination or conspiracy of private persons." *Id.* at 350. This Court also observed that Congress, in the exercise of its power under the Commerce Clause, could have preempted the California raisin price stabilization program. *Id.* The question, then, was whether or not, in passing the Sherman Act, Congress intended "to nullify a state's control over its officers and agents" to carry out the program. *Id.* at 351. This Court held that there was no such intent to be found in the Sherman Act: "The Sherman Act. . . gives no hint that it was intended to restrain state action or official action directed by a state." *Id.*

Although the *Parker* Court wrote that

> a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . and we have no question of the state or its municipality becoming a *participant* in a private agreement or combination by others for restraint of trade[,]

three aspects of "state action immunity" have required further jurisprudential development. *Id.* (emphasis added, citations omitted). First, this Court has had to address the scope of immunity for private action taken pursuant to a state regulatory program. *See, e.g., California Liquor Retail Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). Second, this Court has had to address the question of transference of *state* immunity to a political subdivision, such as a city. *See, e.g., Town of Hallie*, 471 U.S. 34; *Community Communications Co. v. City of Boulder*, 455

U.S. 40 (1982). Third, this Court has rejected the implication of the above-quoted statement from *Parker* that a municipality may lose its immunity if it conspires with a private entity to violate the antitrust laws. *Omni Outdoor Advertising*, 111 S. Ct. 1344. This Court has not addressed the question of whether or not a state can authorize one of its political subdivisions to join the fray of the competitive marketplace and "do whatever it takes", including violating the antitrust laws, to emerge triumphant from that struggle.[6]

In this case, the Eighth Circuit approached the state action immunity question in a manner that would be appropriate for analysis of the permissibility of some anticompetitive state regulatory policy, not of actual anticompetitive marketplace behavior on the part of the City.[7] The Eighth Circuit held that the state's undisputed specific authorization of municipalities to enter into the cable television business included the foreseeable ("necessary and reasonable") consequence of a displacement of competition. *Paragould Cablevision*, 930 F.2d at 1314.

Accepting this conclusion requires a double leap of faith. First it requires acceptance of the proposition that the

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[6] Superficially, *Town of Hallie* would appear to address that question. However, upon examination, it does not. The City of Eau Claire was claimed to have abused its market power in the provision of "sewage treatment services" by tying these services to "sewage collection and transportation services." The sewage treatment business is hardly the paradigm of the typical competitive market for a service; it is a traditional governmental function, like police and fire protection, schooling, road construction and maintenance and water supply.

[7] The Eighth Circuit clearly recognized that Cablevision had alleged the elements of an antitrust case: "Cablevision claims that by granting cable television rights to the CLW, Paragould has facilitated 'monopoly leveraging,' which has been defined as 'the use of (1) monopoly power in one market to (2) restrain competition in a second market.' *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 506 (6th Cir. 1983)." *Paragould Cablevision*, 930 F.2d at 1313.

Arkansas legislature contemplated not only that municipal entry into the cable business necessarily would entail the competitive distortion that results because of the municipality's unavoidable advantages (the economies of scale described at 930 F.2d 1314, and, presumably, access to tax-subsidized capital), but also that the legislature contemplated that the municipality would throw its disproportionate weight around in the marketplace by such tactics as threatening pensioners with loss of retirement pay if they failed to subscribe, telling voters that they are obligated to subscribe to the municipal system and so on. *See* Petition at p. 18, n.9. It is one thing for a state or municipality to be immune from antitrust challenge because of some regulatory program that it devises and administers[8] or because, acting in the public interest, it awards a franchise to one company and denies it to all others[9]; but it is quite another matter to find a license to misbehave from a mere authorization to enter the business.

Second, acceptance of the Eighth Circuit's finding requires acceptance of the proposition that a state can "give immunity to those who violate the Sherman Act by authorizing them to violate it," contrary to the teachings of *Parker. Parker*, 317 U.S. at 351. The Eighth Circuit acknowledged this Court's statement that "this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." *Omni Outdoor Advertising*, 111 S. Ct. at 1351. However, the Eighth Circuit dismissed the statement

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[8] *See, e.g., Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

[9] *City Communications v. City of Detroit*, 888 F.2d 1081 (6th Cir. 1989); *Consolidated Television Cable Service, Inc. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988), *cert. denied*, 489 U.S. 1082 (1989); *Catalina Cablevision Associates v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984); *Gold Cross Ambulance and Transfer Serv. v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985).

as "merely a suggestion and . . . not a rule of law." *Paragould Cablevision*, 930 F.2d at 1312-13.

Neither in *Parker* nor in any of its progeny has this Court ever embraced the notion that anticompetitive conduct by municipalities competing in the marketplace is exempt from scrutiny under the antitrust laws, or that the federalism interests that animate *Parker* require the protection of such conduct from antitrust enforcement. To the contrary, in the opinion for this Court in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), Justice Brennan wrote:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced *at odds with the comprehensive national policy that Congress established.*

Louisiana Power & Light, 435 U.S. at 408 (emphasis added).

Warner Cable submits that, in this case, the issue is more than whether or not, far-fetched as the notion is, the Arkansas legislature sanctioned the egregiously anticompetitive conduct described in Cablevision's Petition.[10] Rather, the issue this case poses to this Court is whether or not the Arkansas legislature has the power to immunize such anticompetitive conduct by a municipality acting, not

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[10] In this case, the Eighth Circuit followed the holding of *Town of Hallie*, and did not consider the State's role in actively supervising the City cable company's conduct. *Town of Hallie* ultimately held that the "active state supervision" prong of the two-prong *Midcal* test for state action immunity was not required when the actor was a municipal government rather than a private party who claimed its acts were mandated by a state regulatory scheme. *Town of Hallie*, 471 U.S. 34, 47.

as a regulator or franchise-giver, but as a marketplace competitor.

II. WHEN A CABLE OPERATOR ENTERS INTO A CABLE FRANCHISE WITH THE APPROPRIATE FRANCHISING AUTHORITY, SUCH ACTION DOES NOT AUTOMATICALLY CONSTITUTE A WAIVER OF IMPORTANT CONSTITUTIONAL RIGHTS.

Rejecting Cablevision's First Amendment claims, the Eighth Circuit held, in essence, that restrictions on speech in contracts signed with government (*e.g.*, cable franchise agreements) cannot form the basis for Constitutional challenges because the signing of such contract waives all applicable First Amendment rights. This holding is the latest in a line of inconsistent decisions that attempt to address the ability of government or its instrumentalities to force a cable operator contractually to waive rights and privileges, whether Constitutional or statutory. This case is an appropriate vehicle for this Court to address this issue and resolve the conflict that exists among the lower courts.

In addition to the First Circuit and the Massachusetts Supreme Judicial Court, as reflected in the factually similar cases of *Nashoba Cable* and *Town of Norwood*, other courts have responded inconsistently to the question of whether, and under what circumstances, a cable operator may waive Constitutional or statutory rights. The Third Circuit, for example, in *Erie Telecommunications v. City of Erie*, 853 F.2d 1084 (3d Cir. 1988), held that Constitutional rights, like rights and privileges of lesser importance, may be contractually waived and thus, a consent decree settling a lawsuit between two competing cable operators and the City of Erie was construed as barring a later action by one of the cable operators against the City. Since the consent decree settled a suit that included a First Amendment claim, the Third Circuit held that a later comparable First Amendment claim had also been waived. *City of Erie*, 853 F.2d at 1096-97.

The Seventh Circuit, however, has questioned whether government should ever be allowed to condition a cable franchise agreement on the waiver of Constitutional rights. In *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 839 (1990), the Seventh Circuit, in dicta, held that "serious reservations arise when a local government with a virtual monopoly on cable access conditions a franchise contract with a cable programer on the stipulation that the programmer waive certain Constitutional rights." *Id.* (citations omitted). Unlike the First Circuit in *Nashoba Cable*, a district court in Iowa and the Supreme Court of Vermont have both held that rights mandated by statute may not be waived or contractually relinquished. *City of Dubuque v. Group W. Cable, Inc.*, No. C-85-1046, slip op. (N.D. Iowa June 18, 1986) (LEXIS, Genfed library, Dist file); *City of Burlington v. Mountain Cable Co.*, 151 Vt. 161, 559 A.2d 153 (Vt. 1988), *cert. denied*, 492 U.S. 919 (1989). In *City of Dubuque*, the district court refused to enforce a pre-Cable Act agreement containing specific waivers of any right to deregulation, holding that such a waiver was not legally permissible under any set of facts. *City of Dubuque*, No. C-85-1046, slip op. Similarly, in *City of Burlington*, the Vermont Supreme Court held that enforcement of the paragraph of the contract regulating rates was contrary to Congressional policy and would not be a valid waiver. *City of Burlington*, 151 Vt. at ___, 559 A.2d at 155. While the Eighth Circuit in the case at bar held that "[by] entering into the franchise agreement... Cablevision effectively bargained away some of its free speech rights[,]" *Paragould Cablevision*, 930 F.2d at 1315, in *City of Burlington* the Vermont Supreme Court explicitly held otherwise. "That the regulation is contained in a contract for good and valuable consideration is immaterial. The attempt to enforce the provisions of the paragraph is an attempt to regulate, and this the [Cable] Act forbids." *City of Bur-*

lington, 151 Vt. at ___, 559 A.2d at 155 (footnote omitted).[11]

A cable television franchise can be a contract of adhesion; and under those circumstances, this Court's requirement that waivers of Constitutional rights be voluntary, knowing and intelligent will be difficult to meet. In this case, the Eighth Circuit failed adequately to address whether waiver was proper under the circumstances; and assuming *arguendo* that some sort of waiver was proper, it failed to address the nature of what was and what was not being waived by Cablevision when it executed the franchise agreement.

Section 621(b) of the Cable Act provides that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b). Franchises are awarded by a "franchising authority", which is defined as any governmental entity empowered by federal, state or local law to grant a franchise. 47 U.S.C. §§ 541(a) and 522(9). The City is the franchising authority in Paragould, Arkansas. Therefore, in order for Cablevision legally to provide cable television services to the residents of Paragould, it was required to obtain a franchise from the City, and only the City. In an adhesion contract, the party in need of the goods is frequently not in a position to shop and obtain

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[11] This Court has addressed the issue of waiver of rights and privileges, whether Constitutional or statutory, in various contexts other than the cable industry. *See, e.g., Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 745 (1981)(rights under Fair Labor Standards Act not waivable), *cert. denied* 471 U.S. 1054 (1985); *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 657-58 (1981) ("a State may not impose *unconstitutional* conditions on the grant of a privilege"); *Alexander v. Gardner - Denver Co.*, 415 U.S. 36, 51 (1974)("there can be no prospective waiver of any employee's rights under Title VII"), *cert. denied*, 423 U.S. 1058 (1976); *Sherbert v. Verner*, 374 U.S. 398 (1963)(requiring waiver of First Amendment rights in order to meet eligibility provisions of South Carolina unemployment compensation statute held unconstitutional).

better terms, often because the provider of the goods enjoys a monopoly, either natural or artificial.[12] As a result of Congress' decision to structure the provision of cable service in this fashion, a franchising authority (the City in this case) enjoys a monopoly position because it alone has the ability and the authority to grant the cable franchise necessary for any cable company to operate. Cable operators (Cablevision in this case) are, therefore, unable to "shop" the market for the best deal; and, instead, they are at the mercy of the franchising authority's unyielding desires.

In at least one case, these conditions led a federal district court to find that the cable franchise agreement between the City of Miami and the cable operator amounted to a contract of adhesion:

> [N]otwithstanding the sophistication of a corporation like Miami TCI, the bargaining power of the parties was far from equal under the circumstances. Consequently, even if the City has established that while Miami TCI was negotiating for the grant of the license, it agreed to waive its right to due process, the City has not satisfied the *heavy burden* of proving the validity of that waiver because it failed to show that the waiver was made voluntarily, knowingly, and intelligently, as opposed to being a necessary condition to the grant of the license.

Miami Tele-Communications, Inc. v. City of Miami, 743 F. Supp. 1573, 1578 (S.D. Fla. 1990)(citations omitted, emphasis added).

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[12] *See* Kessler, *Contracts of Adhesion*, 43 Colum. L. Rev. 628, 632 (1943); *see also Black's Law Dictionary* 38 (5th ed. 1979)(a distinctive feature of an adhesion contract is that the weaker party has no realistic choice as to its terms and the contract is offered on a "take it or leave it" basis).

It is well settled that if a Constitutional waiver is going to be held effective, it must be voluntary, knowing and intelligent. *Edwards v. Arizona*, 451 U.S. 477, 443-85 (1981); *Faretta v. California*, 422 U.S. 806, 835 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *Miami Tele-Communications*, 743 F.Supp. at 1578. Since the Eighth Circuit affirmed the district court's dismissal of the case, for failure to state a claim for relief, no record exists from which it can be determined whether and to what extent the franchise agreement was actively negotiated, or to what extent Cablevision voluntarily relinquished its Constitutional rights. If, as the Eighth Circuit presumptively states, "Cablevision effectively bargained away some of its free speech rights," then perhaps its Constitutional waiver was proper and should be enforced.[13] *Paragould Cablevision*, 930 F.2d at 1315. However, if the City, in negotiating the advertising provision of the franchise with Cablevision, unequivocally refused to grant Cablevision the franchise in the absence of said provision, then the Eighth Circuit's conclusion rings hollow. Under this scenario, such an obdurate position by the City would certainly be grounds for finding that the franchise was a contract of adhesion.[14]

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[13] Of course this would only be true if this Court were to resolve the conflict among the various courts by affirmatively holding that a franchising authority and a cable operator may, by means of a franchise, lawfully waive certain Constitutional and statutory rights belonging to the cable operator.

[14] This Court, in concluding that a cognovit note between two companies with equal bargaining power was not a contract of adhesion, commented that where a contract is one of adhesion and where there is great disparity in bargaining power, and where the debtor receives nothing for the waiver provision, there may not be voluntary, inteliigent and knowing waiver of rights. *See Overmyer*, 405 U.S. at 187-88. Subsequently, this Court applied *Overmyer* to the agreement at issue in *Fuentes*, finding that a contract of adhesion existed because (1) there was no bargaining over contractual terms between the parties, (2) the explicit waiver provision was part of the form contract and (3) the

See Miami Tele-Communications, 743 F.Supp. at 1578. Without a full record, it is impossible to determine whether the requirements for a waiver of Constitutional rights were met in this case.

However, the Eighth Circuit's waiver theory, even if correct, does not lead to that court's ultimate conclusion—that *all* First Amendment rights were waived. Even if Cablevision effectively waived its First Amendment right to solicit and broadcast local advertising on its cable system without City approval, it does not logically follow that merely by entering into the franchise, Cablevision also waived its First Amendment rights not to be targeted for special adverse treatment as compared to similarly situated First Amendment speakers.[15]

When Cablevision entered into the franchise with the City, no other cable services were being provided in Paragould. Nearly eight years passed before the City took the appropriate steps to authorize and issue a franchise for a competing municipally-owned cable television system. Unlike Cablevision's franchise, the municipal cable system franchise does not subject advertising revenues to the franchise fee. This disparate imposition on Cablevision of an

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parties were "far from equal in bargaining power." *Fuentes*, 407 U.S. at 95.

Overmyer and *Fuentes* illustrate the importance of determining whether the agreement between two parties constitutesan adhesion contract. The present case poses a question that falls somewhere between *Overmyer* and *Fuentes*. *Overmyer* involved a clear waiver of a party's Constitutional rights, but was not characterized by this Court as an adhesion contract. *Fuentes*, on the other hand, involved an adhesion contract, but the contract itself contained no clear waiver of Constitutional rights. The present case involves a clear waiver of Cablevision's Constitutional rights (be it valid or invalid) *and* a possible contract of adhesion, a situation this Court apparently has yet to address.

[15] This Court has clearly established that the provision of cable television service is protected by the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

additional franchise fee constitutes an improperly targeted tax, whereby one First Amendment speaker suffers differential taxation relative to a competitor. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star*, 460 U.S. 575; *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

In *Arkansas Writers'*, *Minneapolis Star*, and *Grosjean*, this Court invalidated three different forms of taxation, each of which unconstitutionally discriminated among members of the press (either newspapers or magazines). In none of these cases did the government seek to halt or interfere with the publication of any information; rather, the "First Amendment injury" resulted solely from application of a tax. The newspapers and magazines subject to discriminatory taxation were not precluded from speaking; instead, they suffered economic injury as a result of being targeted for increased tax liabilities, an act this Court found to be repugnant to First Amendment principles. *See, e.g., Arkansas Writers'*, 481 U.S. at 229-30; *Minneapolis Star*, 460 U.S. at 585; *Grosjean*, 297 U.S. at 250.

The facts here are worse than those in *Arkansas Writers'*, *Minneapolis Star*, and *Grosjean*. Not only is Cablevision subject to increased tax liabilities, which will undoubtedly result in economic injury, but also Cablevision is precluded from speaking (*e.g.*, soliciting and providing local advertisements) until it gains the City's approval. It can hardly be said, nor is there any indication in the franchise itself, that when Cablevision entered into the franchise with the City in 1983 it "bargained" for a franchise agreement that would one day be substantially different from and more burdensome than that awarded a competing franchisee. Even if the competing franchisee was a private company, instead of the City itself, the differential taxation imposed by the City upon Cablevision under its franchise

still violates the law as stated by this Court in *Arkansas Writers'*, *Minneapolis Star*, and *Grosjean*.[16]

Thus, the Eighth Circuit used a provision of what may well be an adhesion contract to find a waiver far greater in scope than what reasonably would be inferred from the language of that contract. Given that this "waiver" was of two First Amendment rights, Warner Cable urges this Court to clarify the application of franchise-based waivers of Constitutional and statutory rights.

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[16] Although this Court recently held that "differential taxation of speakers. . . does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas[,]" this Court did not reject the holdings of its earlier decisions that government, by imposition of economic loss through taxation, can inflict First Amendment injury. *Leathers v. Medlock*, ___ U.S. ___, 111 S. Ct. 1438 (1991). *Leathers* involved the differential taxation of different media (*e.g.*, newspapers and cable television). Like this Court's earlier decisions involving differential taxation of members of the same medium, the disparate tax treatment by the City involves two competing cable systems. Furthermore, the differential tax imposed by the City on Cablevision is both "directed at" Cablevision (since it arises uniquely out of Cablevision's franchise) and "presents the danger of suppressing particular ideas"—Cablevision's solicitation and provision of local advertising.

CONCLUSION

The Petition of Paragould Cablevision, Inc. for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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No. 91-469

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PARAGOULD CABLEVISION, INC.,
Petitioner,
v.
CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc., hereby moves, pursuant to Rule 37.2 of the rules of this Court, for leave to file the attached brief *amicus curiae* in support of petitioner. Counsel for petitioner and counsel for respondent Paragould Power, Light & Water Commission have consented to the filing of this brief, but counsel for respondent City of Paragould has declined to do so.

The National Cable Television Association, Inc. (NCTA), a non-profit corporation, is the principal trade association representing cable television operators in the United States. Its members operate cable systems serving approximately 90 percent of the county's more than

50 million cable television subscribers. This case involves two issues of industry-wide importance: (1) whether a municipal cable operator's alleged attempt to displace a private competitor and thereby monopolize the local market is wholly exempt from antitrust scrutiny under the state action doctrine of *Parker v. Brown*, 317 U.S. 314 (1943); and (2) whether a city may require a cable operator to waive its First Amendment rights as a condition of receiving a franchise. These issues are of increasing concern to the NCTA because many municipalities have recently decided to operate cable systems and are misusing their governmental powers to harm private operators. In addition, because of NCTA's broad representation of cable operators, it is very familiar with the issues presented and believes that its views will be of assistance to this Court.

For these reasons, NCTA asks that its motion be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of amicus appears from the foregoing motion.

STATEMENT

This case involves antitrust and First Amendment claims growing out of efforts by a municipal cable television operator to displace a private competitor. The district court dismissed the complaint for failure to state a claim, and the court of appeals affirmed.

1. Petitioner Paragould Cablevision, Inc. ("Cablevision"), began cable operations in 1983 pursuant to a franchise agreement with the City of Paragould, Arkan-

sas (the "City"). Several years later, the City decided to establish a rival cable operation. It raised the necessary capital through a $3.22 million bond issue, backed by anticipated revenues from the cable system and, if necessary, an increase in property taxes. The City then engaged in an aggressive marketing campaign, advising citizens that, unless it received at least 60% of the Paragould cable market, property taxes would probably be increased. According to petitioner, the City began operations in March 1991 and, within six months, it had acquired more than 2,000 customers. During the same period, Cablevision's subscription rate declined from over 6,300 to below 5,000.

2. Cablevision filed this lawsuit in January 1989. It alleged, first, that the City was attempting to monopolize the cable market by cross-subsidizing its cable efforts with monies earned on its monopoly in the Paragould electricity market and also by engaging in predatory pricing and other anticompetitive actions. Cablevision further alleged that the City had violated its First Amendment rights by insisting on enforcing a provision in the franchise agreement allowing the City to renegotiate a higher franchise fee before Cablevision could include advertising on its system. This provision, according to Cablevision, was doubly unconstitutional because the City had imposed no comparable requirement in its franchise agreement with its own cable operator.

The district court dismissed the claims. It first held that the City was immune from antitrust liability on the ground that the Arkansas statutes authorizing municipalities to construct and operate cable systems were sufficient to "reflect the state's policy to permit the city 'to displace competition.'" Pet. App. 21a (citation omitted). The district court also ruled that the restriction on advertising in Cablevision's franchise agreement "is contractual in nature and does not seek, nor have the effect of, regulating speech of any kind." Pet. App. 25a (foot-

note omitted). Furthermore, "[s]ince speech is not restricted by [this agreement], the absence of a similar provision in the City's agreement with [its own cable system] raises no Equal Protection or First Amendment concerns." *Ibid.*

The Eighth Circuit affirmed. As to the antitrust issue, the court recognized that this Court had recently "suggested in *dicta* that there may be a market participant exception to state immunity." Pet. App. 3a (citing *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991)). But the court concluded nevertheless that the market participant "exception is merely a suggestion and not a rule of law" (Pet. App. 3a-4a); therefore, the court held, it would continue to use the general standard for municipal immunity—which requires that a city be acting pursuant to a "clearly articulated and affirmatively expressed state policy." Pet. App. 3a (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985)). The court then found that this immunity standard had been satisfied here by the Arkansas statutes that "permit [the City] to enter into the cable television business." Pet. App. 4a (footnote omitted). The Court reasoned that the general availability of municipal services enables a city to "supply cable services with diminished overhead costs," and that, as a result, "the displacement of competition necessarily results whenever the state authorizes municipalities to enter an industry with monopolistic tendencies." *Id.* at 6a.

Turning next to the constitutional claims, the Eighth Circuit first disagreed with the district court, ruling that the "[City's] alleged insistence on honoring the [franchise] contract does indeed inhibit Cablevision's ability to air commercials, and thus limits free speech in the purest sense." *Id.* at 8a (citation omitted). Despite that conclusion, however, the court of appeals dismissed the First Amendment claims, explaining that "[b]y entering into the franchise agreement . . . Cablevision effectively bar-

gained away some of its free speech rights." *Ibid.* In particular, the court held, Cablevision's acquiescence in the franchise agreement defeated its claim that the City, by failing to impose a similar restriction on its own system, had unlawfully discriminated with respect to First Amendment rights.

ARGUMENT

This case presents two questions of broad importance. The first concerns the scope of antitrust immunity for municipalities when they themselves go into business. The second concerns the extent to which the government may require individuals to "bargain away" constitutional rights as a condition of receiving a public franchise. Both questions merit review by this Court.

I. THIS COURT SHOULD CLARIFY THE SCOPE OF ANTITRUST IMMUNITY FOR DIRECT MARKET PARTICIPATION BY STATE AND LOCAL GOVERNMENT.

The antitrust issue presented by this case is the one expressly left open last Term in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991) —the extent to which antitrust immunity "obtain[s] where the State acts not in a regulatory capacity but as a commercial participant in a given market." *Id.* at 1351. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.2e, at 141 (Supp. 1991) ("[w]hether such [a market] exception in fact existed and what its scope would be the Court [in *City of Columbia*] did not say"). This is an important issue on which the lower courts need further guidance, especially because the suggested distinction appears to be inconsistent with this Court's earlier decision in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). As the court of appeals put it in this case, "the market participant exception is merely a suggestion and is not a rule of law. Until such a transformation occurs, we will continue to use [a different] test established by this circuit." Pet. App. 3a-4a.

A. The Test for State Action Immunity Should Be More Stringent When the Government Participates in Commercial Markets Than When It Regulates Third Parties.

This Court in *City of Columbia* made clear that municipalities would be given a fairly wide berth in their ability to adopt anticompetitive regulatory policies under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). In particular, the Court emphasized, a state statute need not "explicitly permit[] the displacement of competition. . . . It is enough, we have held, if suppression of competition is the 'foreseeable result' of what the statute authorizes." 111 S. Ct. at 1350 (quoting *Town of Hallie*, 417 U.S. at 42). The *City of Columbia* Court also went on to apply this "foreseeability" standard rather gently, concluding that state authorization to engage in zoning provides a sufficient basis for immunizing a municipal regulation that conferred a monopoly on a private billboard company. 111 S. Ct. at 1350.

But even as it took a permissive approach to municipal regulation, the Court in *City of Columbia* specifically indicated that a different standard might be warranted when state or local government is acting as a "market participant." *Id.* at 1353; *see also id.* at 1351. In our view, the suggested distinction is well founded: the two situations raise different federalism, as well as different antitrust, concerns. This Court should thus follow up on its own suggestion. In particular, it should hold that any anticompetitive activity by a municipal market participant must be "expressly authorized" by the state before the activity is exempt from antitrust scrutiny.

1. *The Regulator-Participant Distinction.* The Sherman Act distinction between the government as market regulator and the government as market participant originated in *Parker* itself. As the *City of Columbia* Court explained, "[t]he rationale of *Parker* was that, in light of our national commitment to federalism, the general

language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States *in their governmental capacities as sovereign regulators.*" 111 S. Ct. at 1351 (emphasis added). Indeed, to emphasize this point, the Court in *Parker* had expressly noted that the "state . . . entered into no conspiracy in restraint of trade or to establish monopoly." 317 U.S. at 352; *see id.* at 351-52 ("we have no question of the state or its municipality becoming a participant in a private agreement"). *See also City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978) (Burger, C.J., concurring) ("for purposes of federalism," there is an important "difference between a State's entrepreneurial personality and a sovereign's decision—as in *Parker*—to replace competition with regulation") (footnote omitted).

In the antitrust context, as in other areas, the distinction between "States as market participants and States as market regulators makes good sense and sound law." *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980). For one thing, the two roles occupy very different places in our constitutional structure: "[a]s every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). By contrast, "[w]hen a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader." *Ohio v. Helvering*, 292 U.S. 360, 369 (1934). This commercial role is neither a constitutionally identified, nor a traditionally sovereign, state activity. *See New York v. United States*, 326 U.S. 572, 579 (1946) ("State trading did not actively emerge until relatively recently.").

As importantly, there is substantially more reason to "presume . . . [that government] acts in the public interest" (*Town of Hallie*, 471 U.S. at 45) when it regulates *others* than when it seeks to protect its own, parochial business interests. At best, the suggestion that the "goal [of a government business] is not private profit but pub-

lic service is only partly correct." *City of Lafayette*, 435 U.S. at 403 (plurality opinion). *See also United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977) (Contract Clause analysis is more rigorous when state impairs its own contract, because of concern that "a governmental entity can always find a use for extra money, especially when taxes do not have to be raised"); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (same as to Takings Clause analysis). This dimension of economic self-interest is not nearly as likely to be present when the government regulates others.

For these reasons, it is a "familiar concept that 'there is a constitutional line between the State as government and the State as trader.'" *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 696 (1976) (citation omitted). *See generally* Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 Va. L. Rev. 1073 (1980). Most significantly for present purposes, this Court recently relied on this distinction in holding that the Robinson-Patman Act applies to state proprietary activities. *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories*, 460 U.S. 150 (1983). Stressing that it was not dealing with "state purchases for *use* in traditional governmental functions" (*id.* at 153-54), the Court concluded that there was no reason to exempt "state purchases *for the purpose of competing against private enterprise*—with the advantage of discriminatory prices—in the retail market." *Id.* at 154 (emphasis added) (footnote omitted). Notably, in reaching that conclusion, the Court placed heavy reliance on its decision in *City of Lafayette*, which the *Jefferson* Court characterized as having held that the Sherman Act applies to "a city in competition with a private utility." *Id.* at 158.

On the other side of the same coin, the Court has also recognized a "market participant exception"—this time, protective of state commercial interests—under the Commerce Clause. *Reeves, Inc. v. Stake*, 447 U.S. at 437.

Relying first on the historical fact that the "Clause responds principally to state taxes and *regulatory* measures" (*ibid.* (emphasis added)), the Court further observed that "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints" (*id.* at 439 (footnote omitted)). That same concern for "evenhandedness" also supports a rigorous application of the Sherman Act when state and municipal governments choose to participate in commercial markets.[1]

2. *The Different Immunity Standards.* In our view, the appropriate place to differentiate municipal immunity standards is with respect to the degree of specificity required in the state authorizing law. In particular, while considerable flexibility is warranted when a municipality regulates others, the Court should require express state authorization for anticompetitive practices engaged in by a municipal market participant. This distinction reasonably reflects the different government interests that are implicated by the different roles. And its practicality is

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[1] The "governmental-proprietary" distinction has been criticized at times as being arbitrary and unworkable. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955). The force of such criticism, however, obviously depends on the particular circumstances of the doctrine's application. For example, it does indeed seem talismanic to decide intergovernmental tax immunity cases by pigeonholing an increasingly complex array of government functions into two discrete boxes. That is so, we submit, precisely because the purpose of the tax immunity doctrine is *not* to protect national markets and, therefore, the distinction is not well tailored to the issue it is supposed to resolve. *See, e.g., New York v. United States*, 326 U.S. at 580-83. On the other hand, when the dispositive question is whether the state is selling goods or services—as distinguished from regulating private parties—the doctrine's application is straightforward and sensible. That is so, in turn, precisely because the sole purpose of the antitrust law *is* to regulate national markets (and, correspondingly, the purpose of the Commerce Clause is to prevent undue state regulation of such markets).

demonstrated by the fact that the Court already has adopted such a state-authorization requirement for *private* market participants.

As indicated earlier, the contemporary standard for municipal immunity was explicitly fashioned in *Town of Hallie* and elaborated through application in *City of Columbia*. *See* p. 5, *supra*. To summarize, it now appears that "the key factor for state action immunity is whether a state legislature has delegated regulatory authority in a general subject area, . . . [T]he Court is [then] prepared to use its imagination liberally in determining whether particular anticompetitive conduct was a foreseeable or logical result of the regulatory delegation." Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Calif. L. Rev. 227, 244 (1987). *Compare City of Columbia*, 111 S. Ct. at 1350 ("[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition"), *with id.* at 1360 (Stevens, J., dissenting) ("South Carolina statutes that confer zoning authority on municipalities in the State do not articulate any state policy to displace competition with economic regulation in any line of commerce").

This flexible approach to immunity makes good sense when a municipality is acting in a *regulatory* capacity. That conclusion follows directly from the fact that regulation, by its very nature, is likely to have anticompetitive effects. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978) ("if an adverse effect on competition were, in and of itself, enough to render a state statute invalid [under the antitrust laws], the States' power to engage in economic regulation would be effectively destroyed"); Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. of Law & Econ. 23, 23-25 (1983) (same). This inherent quality of regulation, in turn, means that it would be virtually impossible for a

State to "catalog all of the anticipated [anticompetitive] effects" (*Town of Hallie*, 471 U.S. at 43) when it delegates broad regulatory power to a municipality. Indeed, the very purpose of the delegation is to allow the *municipality* to select what specific actions to take from a range of possibilities, each of which may have *different* anticompetitive effects. Thus, a rule requiring States to authorize specific anticompetitive results when they delegate general regulatory authority would be, in the words of the *Town of Hallie* Court, "unrealistic" (*ibid.*) and also would tend to have "detrimental side effects upon municipalities' local autonomy" (*id.* at 44).

This reasoning simply does not apply, however, when the state authorizes a municipality to enter commercial markets. That kind of authorization, much like the state's grant of a charter to a private party—and in sharp contrast to a statute authorizing zoning—says absolutely nothing about market regulation (with its concomitant anticompetitive effects). Thus, the natural presumption is—and should be—that, nothing else said, all market participants are fully subject to the Sherman Act. To rebut that presumption, the state, at a minimum, should be required to make a particularized regulatory decision, identifying which, if any, anticompetitive activities such market participants are allowed to undertake.

Unlike in the regulatory area, moreover, an express-state-authorization requirement for municipal market participants would not be "unrealistic." *Town of Hallie*, 471 U.S. at 43. In most instances, the basic question will be whether to authorize a monopoly or other specific form of market restraint (such as the price and output restrictions at issue in *Parker*). That question can readily be answered by the state when it authorizes municipal market participation. Indeed, such express state authorization is already required for antitrust immunity for private market participants. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Alum-*

inum, Inc., 445 U.S. 97, 105 (1980) ("the *challenged restraint* [here, retail price maintenance] must be 'one clearly articulated and affirmatively expressed as state policy' ") (emphasis added) (citation omitted).[2] There is no legitimate reason to tolerate a lesser authorizing requirement for public market participants.

B. The Uncertainty Created By This Court's Suggestion of a Market Participation Exception Should Be Resolved.

The court of appeals in this case candidly acknowledged its confusion over the market participant exception referred to in *City of Columbia*. Pet. App. 3a-4a. In our view, that confusion grows out of the fact that, given the heavy emphasis on *state* sovereignty in *Parker*, this Court has been struggling to find a sensible way to deal with non-sovereign municipalities under that case's rationale. Thus, the municipal immunity doctrine, from its inception thirteen years ago until last year's decision in *City of Columbia*, has gone through several phases as the quasi-sovereign nature of local governments has been accorded somewhat different significance in terms of constitutional federalism. As a by-product of this evolution, there currently exists an inconsistency between the Court's recent suggestion of a market participant exception and its earlier implicit rejection of such a view in *Town of Hallie*.

A brief review of the Court's municipal immunity cases may help to explain how this confusion arose and why it requires clarification. In its first such case, a

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[2] Although the general requirement for immunizing regulatory decisions by municipalities has been phrased in similar terms—" 'clear articulation of a state policy to authorize anticompetitive conduct' " (*City of Columbia*, 111 S. Ct. at 1350 (quoting *Town of Hallie*, 471 U.S. at 40))—the municipal standard does not require that "the challenged *restraint* . . . be . . . clearly articulated and affirmatively expressed." *Midcal*, 445 U.S. at 105 (emphasis added) (internal quotations omitted).

sharply divided Court held that state authorization to operate an electric utility did not immunize allegedly anticompetitive acts that included an attempt to monopolize. *City of Lafayette*, 435 U.S. at 392 n.6. This decision rested both on sovereignty notions and on market participation notions. Thus, the Court first emphasized that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *Id.* at 412 (plurality opinion) (citing Eleventh Amendment cases). At the same time, the plurality also focussed on "the impact which local governments, *acting as providers of services*, may have on other individuals and business enterprises with which they interrelate as purchasers, suppliers, and sometimes, as here, as competitors." *Id.* at 403 (footnote omitted); *see also id.* at 408. Chief Justice Burger, who cast the deciding vote in *City of Lafayette*, relied exclusively on the fact that the "cities are engaging in what is clearly a business activity." *Id.* at 418 (concurring opinion). Given this configuration of opinions, *City of Lafayette* ultimately shed little light on the relative importance of a municipality's non-sovereign status versus its market participation in analyzing *Parker* claims.

Subsequent decisions have attempted to clarify *City of Lafayette's* ambiguity. First, in *Community Communication Co. v. City of Boulder*, 455 U.S. 40 (1982), the Court held, again by a five to four margin, that "home rule" authorization was insufficient to support immunity for municipal regulatory decisions. That conclusion rested squarely on the ground that "[o]urs is a 'dual system of government,' which has no place for sovereign cities." *Id.* at 53. (citation omitted). But this restrictive view of municipal "sovereignty" was softened considerably three years later in *Town of Hallie*. In that case, the Court, relying on the *dissent* in *City of Lafayette*—which had taken a strong pro-sovereignty view of municipalities (435 U.S. at 434-35)—held that a reasonably flexible approach to municipal immunity was necessary to protect

"municipalities' local autonomy and authority to govern themselves." 471 U.S. at 44. Finally, the *City of Columbia* Court reaffirmed this broad "sovereignty" view of municipalities for regulatory decisions, but then suggested, returning to *Parker* itself, that such a view might not be appropriate when government acts as a market participant.

The immediate problem with these developments for the lower courts is that *Town of Hallie* itself was a market participant case: the defendant city was in the waste removal and disposal businesses. Thus, at least in light of the facts in *Town of Hallie*, the legal issue that *City of Columbia* left open appears to have already been implicitly decided. Although, for the reasons just discussed, we think *Town of Hallie* should properly be read as having addressed the general quasi-sovereign status of municipalities for *Parker* purposes—and not the regulatory-market participation distinction raised in *City of Columbia*—that conclusion is obviously not free from doubt. This Court should provide further guidance.

II. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER SPEECH RESTRICTIONS CONTAINED IN CONTRACTS BETWEEN GOVERNMENT AND PRIVATE PARTIES MAY BE CHALLENGED UNDER THE FIRST AMENDMENT.

The Eighth Circuit's rejection of petitioner's First Amendment claims presents a second issue worthy of review. The court of appeals held, in essence, that restrictions on speech contained in a contract with government (such as a cable franchise agreement) cannot form the basis of a constitutional challenge because the signing of such a contract waives all applicable First Amendment rights. This holding is fundamentally inconsistent with this Court's decisions involving "unconstitutional conditions" on government benefits and, if permitted to stand, will have serious practical consequences in the specific context of cable franchising.

In its complaint, petitioner raised a First Amendment challenge to the provision in its franchise agreement barring it from carrying advertising until it obtained permission to do so through renegotiation with the City and (in all likelihood) payment of an additional fee. This challenge was based in part on the fact that the competing municipal system was being allowed to carry such advertising without paying the additional fee.[3] The Eighth Circuit gave short shrift to these First Amendment claims, however, ruling that, while petitioner's speech was indeed restricted by the franchise agreement, petitioner had "effectively bargained away some of its free speech rights" —"[p]resumably" in return for some "consideration." Pet. App. 8a.

This analysis by the court of appeals is fundamentally unsound. If the acceptance of a government franchise (or any other governmental benefit, for that matter) were sufficient to defeat a constitutional challenge to the conditions that are imposed on the beneficiary, the unconstitutional conditions doctrine would be a dead letter. Every party who accepts a government benefit may be said to have "agreed" to the accompanying conditions, at least in the sense that the Eighth Circuit used that term —*i.e.*, the party was free not to take the benefit in the first place. Thus, under that court's approach, a city-imposed requirement that a cable operator air only pro-incumbent editorials would be immune from constitutional attack on the ground that the operator agreed to it as part of the overall franchise negotiation. That is not, and should not be allowed to become, the law.

On the contrary, even though the overwhelming majority of conditions on government benefits are found to be constitutional (*e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 57 n.65, 99 (1976) (*per curiam*) (public financing of campaigns

[3] The two franchise agreements each require payment of a franchise fee representing 3 percent of the cable system's gross revenues from subscribers. Only petitioner's agreement contains a conditional prohibition of advertising.

may be conditioned on agreement to campaign expenditure limits)), the process by which that conclusion is reached is necessarily more complex than the Eighth Circuit believed. Thus, in the closely analogous area of government employment, this Court has on numerous occasions made clear that voluntary acceptance of such employment does *not* bar a challenge to "unconstitutional conditions" imposed on government employees. *See, e.g., Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2736 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Moreover, when it comes to First Amendment rights, in particular, there are two well-established limitations on the government's power to condition the receipt of public benefits.

First, as a rule, the government may not require private parties to agree to espouse or not to espouse particular ideas. *See, e.g., Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (*dictum*) (government may not "discriminate invidiously in its subsidies in such a way as to '"ai[m] at the suppression of dangerous ideas"'") (citations omitted); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (government may not condition tax exemption on refraining from engaging in protected political speech). The only exception to this rule is a speech limitation or requirement that directly and rationally serves the legitimate interests being pursued by government in the area at issue. *See, e.g., Rust v. Sullivan*, 111 S. Ct. 1759, 1771-73 (1991). In the employment context, for example, the government may require a specific political affiliation in some high-level policy jobs (*see Branti v. Finkel*, 445 U.S. 507, 517-18 (1980)), and also may demand that its employees avoid speech which would interfere with job performance. *See, e.g., Connick v. Myers*, 461 U.S. 138, 150-54 (1983).

Second, even where government does not expressly regulate the content of speech through conditions imposed on its benefits, the First Amendment still demands that it avoid certain forms of discrimination among speakers in

the distribution of government largesse. Such discrimination occurs, most obviously, when the state provides favorable treatment to speakers whose viewpoint it supports. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987) (invalidating tax imposed on magazines that exempted those with specified content). But it also occurs whenever the state singles out particular members of the press and imposes disparate financial burdens on them—a practice almost inherently fraught with the danger of content-based favoritism. *See id.* at 228-29; *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983) (invalidating tax limited to state's largest newspapers).

In this case, the provision in the franchise agreement barring advertising can be viewed as a direct restriction on content that would be facially invalid. *Cf. Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (striking down a municipal ordinance barring adult programming on cable systems). Alternatively, it might be viewed as a legitimate means of assuring the City a chance to negotiate a higher fee if and when petitioner adds a new income-producing feature to its system. But even assuming that the latter view correctly describes the facts of this case, there remains the issue of discrimination among speakers. The City has no right to impose a "surcharge" for advertising—reasonable or otherwise—where it does so only with respect to petitioner and not its competitor.

It is no answer to such discrimination to say that petitioner accepted the surcharge in the negotiation of the franchise agreement. The signing of a contract with government, on the best terms then available, hardly constitutes implicit authorization for the government to provide better terms to some other speaker. Indeed, even if a contracting party *expressly* waived all future claims of illegal discrimination under the First Amendment, such a provision would likely be unenforceable.[4]

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[4] In contrast to most constitutional rights, the First Amendment is more than an individual right; it is also aimed at preserving a

In sum, the decision below is fundamentally out of step with this Court's entire approach to the issue of conditioning government benefits on acceptance of restrictions that would otherwise violate the First Amendment. Unsurprisingly, it is also inconsistent with decisions from other circuits, which have carefully reviewed the justifications for contractual speech restrictions. Thus, two circuits have applied substantive First Amendment analysis to confidentiality agreements restricting the speech of former government employees. *See McGehee v. Casey*, 718 F.2d 1137, 1141 n.10 (D.C. Cir. 1983) ("It makes no difference to our analysis whether the government seeks to restrict the speech rights of its employees by individual contract or by a broad rule applicable to a class of employees."); *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir.) ("the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship"), *cert. denied*, 409 U.S. 1063 (1972). Moreover, as petitioner notes, the Seventh Circuit, in *dictum*, has sharply questioned the notion that "a local government with a virtual monopoly on cable access [may] condition[] a franchise contract with a cable programmer on the stipulation that the programmer waive certain constitutional rights." *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 n.6 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 839 (1990) (citing various unconstitutional-conditions cases).

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free flow of all ideas to willing listeners. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974). The government should not be permitted to alter that flow by inducing some speakers to waive discrimination claims as a condition of receiving a benefit. *See* Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1496 (1989) ("If government could freely use benefits to shift viewpoints in a direction favorable to the existing regime, democratic self-government would be undermined.").

The final reason supporting further review here is the potentially far-reaching consequences of the decision below on the entire cable industry. In that field, as in no other, local governments exercise enormous control over the access of would-be members of the press by requiring them to obtain franchises. If First Amendment claims are fully waivable in such instances, then success in competing for franchises may increasingly come to depend on which potential operator is most receptive to speech restrictions favored by cities. Moreover, when, as is happening with increasing frequency, multiple cable operators move into a single market, the Eighth Circuit's grant of *carte blanche* for contractual discrimination among operators will provide cities with a potent weapon for assuring that some operators succeed in suppressing their competitors. In view of these potentially mischievous consequences, the decision of the court of appeals merits immediate review and reversal.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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